

Vanderbilt University Law School Scholarship@Vanderbilt Law

Vanderbilt Law School Faculty Publications

Faculty Scholarship

2011

The Law of War in the War Against Terrorism

Michael A. Newton

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Michael A. Newton, *The Law of War in the War Against Terrorism*, 9 Loyola University Chicago International Law Review. 1 (2011)
Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/643>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law School Faculty Publications by an authorized administrator of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

HEINONLINE

Citation: 9 Loy. U. Chi. Int'l L. Rev. 1 2011-2012

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu Jan 10 11:59:22 2013

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

LOYOLA UNIVERSITY CHICAGO INTERNATIONAL LAW
SYMPOSIUM KEYNOTE ADDRESS

THE LAW OF WAR IN THE WAR AGAINST TERRORISM

Michael A. Newton[†]

My purpose in what I intend to be a brief keynote address is to provide the framework upon which the excellent panels to follow will no doubt amplify. I have little doubt that some of you in attendance would prefer to have a debate framed by the pointed rejoinder that there can be no war against terrorism; hence a discussion grounded in *jus in bello*¹ is inapposite and inevitably counterproductive. The logical retort would be that the conference organizers have set these topics and I merely respond to their stated desires. That, however, would obscure the fact that I am among those who believe that the corpus of *jus in bello* has been challenged in the post-9/11 era as never before. In fact, let me be plain at the outset. The understanding and compliance with the laws and customs of war is the very essence of American military professionalism. Our compliance with the normative constraints on the application of battlefield violence and the appropriate enforcement that should flow from violations of that professional ethos are, in my personal opinion, at the very core of our national identity and our ultimate effectiveness in accomplishing victory over our enemies. There is a reason that the courageous American men and women who deploy into harm's way to confront our enemies wear our flag on their right shoulders – they are the living exemplars of our values and our virtues. In fact, the yawning delta between the actions and ethos of a professionalized American military and the manner in which those actions are distorted by our enemies creates what may well be the most difficult counterinsurgency dilemma facing the force today. We must get the law right – and to win, we must succeed in demonstrating the utility of lawfully applied violence in the midst of an often skeptical and misinformed hostile population.

There is an indisputable space in which the established body of laws that we collectively term “the laws and customs of war” is in full effect as the forces of free societies confront their opponents on battlefields across the globe. The debates over the normative effect and overall applicability of the laws and customs of war have raged on both sides of the Atlantic, and perhaps most recently in the context of the NATO missions in the Afghanistan and Pakistan area of opera-

[†] Professor of the Practice of Law, Vanderbilt University Law School. For an abbreviated biography and contact information for the author, visit *Michael A. Newton*, VANDERBILT UNIVERSITY LAW SCHOOL, <http://law.vanderbilt.edu/newton>. The author wishes to thank the Symposium organizers for the excellent panels to follow this keynote address and acknowledges that the inevitable errors, omissions, and oversights of this address are solely attributable to the author.

¹ *Jus ad bellum* is the commonly used Latin reference that seeks to isolate the dimensions of international law analysis that address the circumstances under which war, or in some instances military force short of armed conflict, may be a lawful mechanisms for solving disputes between sovereign states.

The Law of War in the War Against Terror

tions. There have, however, been a number of significant opinions emanating from domestic courts² as well as international human rights bodies³ that have spawned debate over the precise application and the contours of the applicable *jus in bello* regime. For those in attendance who believe that “terrorism is a tactic” and subscribe to the extension of that premise that to describe a war against a tactic is oxymoronic and unproductive, I ask only for your indulgence and patience both for the time allotted to my remarks and for the excellent slate of panels that lie ahead.

My duty this morning is to provide, in an altogether inadequate amount of time, an overview of the entire field of *jus in bello* by way of setting the context for the speakers to come. I shall proceed to do that by framing the legal concepts, primary points of tension, and highlighting some areas where I believe the normative structure should be clarified or in some cases reconceived in contradistinction to the modern supposedly “progressive” trends of legal developments around the world. Your very attendance this morning conveys that you are neither ignorant nor apathetic regarding the key issues of our day or the granularity of the legal debates that will shape your careers. I would add that these debates and their resolution will shape the destiny of our Republic and have an immeasurable impact on both our standing in the world and on our ability to effectively confront those enemies who would destroy the American way of life and undermine the values that we hold dear.

In this context, the understanding and application of the laws and customs of war in the modern era are no mere afterthought. The struggle to define the contours of the legal regime and to correctly communicate those expectations to the broader audience of civilians is a recurring problem that is integrally related to the current evolution of warfare. Shaping the expectations and perceptions of the political elites who control the contours of the conflict is perhaps equally vital. The paradox is that as the legal regime applicable to the conduct of hostilities has matured over the last century, the legal dimension of conflict has at times overshadowed the armed struggle between adversaries. As a result, the overall military mission will often be intertwined with complex political, legal, and strategic imperatives that require disciplined focus on compliance with the applicable legal norms as well as the most transparent demonstration of that commitment to sustain the moral imperatives that lead to victory. For example, in his seminal 1963 monograph describing French operations in Algeria, counterinsurgency scholar David Galula observed that if “there was a field in which we were definitely and

² See, e.g., *Her Majesty the Queen v. Mohammed Momin Khawaja*, Ontario Superior Court of Justice, in *TERRORISM: INTERNATIONAL CASE LAW REPORTER* 319 (Michael A. Newton, ed, Oxford University Press, vol. 1 2008); see also *Al-Skeini v. Sec’y of State for Def.*, [2007] UKHL 26, 3 WLR 33 (appeal taken from Eng.) (holding that British soldiers in Iraq who were thought to have unlawfully killed and tortured Iraqi civilians could be tried under domestic law as opposed to an automatic transfer of jurisdiction to the International Criminal Court).

³ *Al-Skeini and Others v. The United Kingdom* (Application No. 55721/07), 2011 Eur. Ct. H.R. 1093 (July 7), available at <http://www.bailii.org/eu/cases/ECHR/2011/1093.html>; *Al-Jedda v. The United Kingdom* (Application No. 27021/08), 2011 Eur. Ct. H.R. 1092 (July 7), available at <http://www.bailii.org/eu/cases/ECHR/2011/1092.html>.

The Law of War in the War Against Terror

infinitely more stupid than our opponents, it was propaganda.”⁴ The events at Abu Ghraib are perhaps the most representative of clear-cut violations of the laws and customs of war, and provide an enduring example of what General David Petraeus has described as “non-biodegradable events.”⁵ There are many other examples of events during conflict that strengthen the enemy even as they remind military professionals of the visceral linkage between their actions and the achievement of the mission. The United States doctrine for counterinsurgency operations makes this clear in its opening section:

Insurgency and counterinsurgency. . .are complex subsets of warfare. Globalization, technological advancement, urbanization, and extremists who conduct suicide attacks for their cause have certainly influenced contemporary conflict; however, warfare in the 21st century retains many of the characteristics it has exhibited since ancient times. Warfare remains a violent clash of interests between organized groups characterized by the use of force. Achieving victory still depends on a group’s ability to mobilize support for its political interests (often religiously or ethnically based) and to generate enough violence to achieve political consequences. Means to achieve these goals are not limited to conventional force employed by nation-states.⁶

In the decade since 9/11, the awareness of the legal contours of the laws and customs of war and the implicit linkage between those tenets and the American role in the world has been highlighted as never before in our history. Ten years ago when these debates first circulated in earnest at the highest levels of the U.S. Government, the circle of experts intimately familiar with the principles of this field and their relationship to the conduct of operations against terrorists was small indeed. There was an even smaller core of experts who could navigate the occasionally conflicting streams of jurisprudence that continue to flow from international and internationalized tribunals around the world, much less distinguish those precedents or dispel their errors as required. I am pleased to report that we are well advanced from that stage. We are, nevertheless, caught in a vortex between the tides of legal evolution and the imperatives of ongoing operations. One need only observe the international debates that resulted from the intentional targeting and successful operation to kill Osama bin Laden to appreciate the enormity of the present debates and the chasms of understanding between U.S. practitioners and our allies around the world.

⁴ DAVID GALULA, *PACIFICATION IN ALGERIA 1956–1958* 141 (RAND Corp. ed. 2006).

⁵ *One-on-One with General David Petraeus: One of Our Most Powerful Military Leaders Talks About Iraq and Afghanistan*, VU Cast Vanderbilt University’s News Network (Mar. 5, 2010), available at <http://news.vanderbilt.edu/2010/03/watch-vucast-extra-one-on-one-with-general-david-petraeus-108942/>; see also Uthman al-Mukhtar, *Local Sunnis Haunted by the Ghosts of Abu Ghraib*, SUNDAY HERALD, Dec. 26, 2010, <http://www.heraldscotland.com/mobile/news/world-news/local-sunnis-haunted-by-the-ghosts-of-abu-ghraib-1.1076485>; Joseph Berger, *U.S. Commander Describes Marja Battle as First Salvo in Campaign*, N.Y. TIMES, Feb. 21, 2010, <http://www.nytimes.com/2010/02/22/world/asia/22petraeus.html>.

⁶ DEP’T OF ARMY, F.M. 3-24, COUNTERINSURGENCY, ¶ 1-1 (2006).

The Law of War in the War Against Terror

At the same time, I do not intend to artificially exaggerate the legal divisions in the western world as nations confront the common terrorist threat, and these divisions should not be exaggerated. There are many examples of normative consensus that coalesced around substantively identical positions among allies, but through very different legal routes and rationales. I have written in other contexts to debunk the notion that the refusal of the United States to ratify Protocol I to the 1949 Geneva Conventions represented an act of so-called “exceptionalism.”⁷ In fact, one can only put the U.S. rejection of Protocol I into proper perspective by identifying the substantively identical positions that became manifest in the wake of 9/11 as several of the most important multilateral terrorism treaties entered into force on the heels of a wave of state accessions. The United States was one of the most influential drivers in the promulgation of the principles regulating hostilities that define the lawful scope of participation in armed conflicts. This line of treaties, derived from the strong political and military support of the United States, ended during the negotiations for the 1977 Protocols to the 1949 Geneva Conventions.⁸ Protocol I is applicable to armed conflicts of an international character, but the final text incorporated highly controversial changes to the types of conflicts that could legally be characterized as interstate wars. These politically motivated changes to the framework of humanitarian law sought to grant combatant immunity to a far broader class of persons. It is clear that many of the Protocol’s substantive formulations are now well entrenched in the corpus of customary international law. However, the post 9/11 era has demonstrated the definitive rejection of efforts by many Third World nations, supported by the negotiating muscle of socialist states, that sought to hijack the Protocol to achieve explicitly political objectives. To be clear, the key changes inserted by some states into the treaty text served to endanger innocent civilians and to lend a fig leaf of legal credence to terrorist tactics. Protocol I is accordingly unique in having been described as “law in the service of terror.”⁹

The United States concluded that the most controversial aspects of Protocol I represented an impermissible alteration of the cornerstone concepts of combatancy rather than a natural and warranted evolution of the laws of war. The U.S. rejection of Protocol I represented far more than hypocritical “exceptionalism” however, as the underlying policy position provided the template for sustained engagement with other nations. The overwhelming solidarity of states sharing the U.S. position that international law affords no protection for the crim-

⁷ Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terror*, 42 TEX. INT’L L. J. 323, 348-50 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524301.

⁸ Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of International Armed Conflicts, Dec. 7, 1979, 1125 U.N.T.S. 3 (hereinafter “Protocol I”); see also Douglas J. Feith, *Law in the Service of Terror*, THE NAT’L INTEREST ON INT’L LAW & ORDER 183-84 (R. James Woolsey, ed., Transaction Pub., 2003) (discussing differences of opinion held by “Westerners” and “Socialists” during the negotiations for Protocol I and how arguments made by the United States ultimately did not prevail leading to their abstention from voting).

⁹ Feith, *supra* note 8, at 36-37; see also Abraham Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 901-03 (1986) (stating that “At its worst the [international] law [applicable to terrorism] has in important ways actually served to legitimize international terror, and to protect terrorists from punishment as criminals.”).

The Law of War in the War Against Terror

inal acts of terrorists became clear over more than two decades and was revalidated following the shock of 9/11. What might be pejoratively labeled U.S. “exceptionalism” in fact represented a principled policy decision based on national interests that provided the impetus for deeper engagement in shaping the legal norms applicable to terrorist acts. In other words, the U.S. position accurately reflected underlying community interests of states engaged in a struggle against terrorists and thus established the normative standards that prevented later attempts to blur the distinctions between terrorists and privileged combatants.

This, by the way, is one of the many reasons why you should love being international lawyers. Wherever you go in the world, and whatever language you find yourselves negotiating in, you may refer to the common body of underlying norms. The Geneva Conventions are ubiquitous and universal, despite the fact that the interpretation and application of those provisions will often be the subject of sharp debate and sustained lawyering. Anywhere you travel in the world, you will find a core of legal professionals prepared to pull out the Geneva Conventions and their supporting legal framework and discuss the applicability of common principles and values. You must always be aware, however, that even though we are speaking the same legal language using a common vocabulary, your enemies often import a dramatically different perspective onto those issues. In fact, in many instances, our enemies have neither the strategic constituency nor the simple intent to accurately characterize the correct state of the law related to *jus in bello*. The debate and continuing evolution over the linkage between the concepts of combatancy and direct participation drawn from the laws and customs of war and the scope of the crime of material support to terrorism illustrate only one aspect of these challenges.

Before I move to the categories of evolving norms, let me provide you another example of what I mean by the relative homogeneity of the modern laws and customs of war. Against the complicated backdrop of ongoing military operations and often conflicting perspectives, you cannot forget that one of the core objectives of the Assembly of States Parties to the Rome Statute is to create a system of universality that helps to “guarantee respect for and lasting enforcement of international justice.”¹⁰ As early as the 1907 Hague Regulations, civilized nations sought to capture the commonality of shared values in detailed provisions of the laws of war related to the rights and obligations assumed by persons and nations participating in conflict. For their era, the Hague Regulations encompassed the definitive range of applicable legal norms related to the lawful conduct of hostilities. However, the enforcement of those precepts in the military commissions following World War II was the essential step needed to bring life and substance to the legal principle that “the right of belligerents to adopt means of injuring the enemy is not unlimited.”¹¹ In the same manner,

¹⁰ U.N. Secretary-General, *Rep. of the International Criminal Court for 2006/07*, ¶ 41-42, U.N. Doc. A/62/314 (Aug. 31, 2007).

¹¹ Regulations annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 22, Oct. 18, 1907, *reprinted in* DOCUMENTATION ON THE LAWS OF WAR 73 (Adam Roberts & Richard Guelff eds., 3d ed. 2000); *see also* Protocol I, *supra* note 8 (“In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”).

international prosecutors at the International Military Tribunal at Nuremberg helped to create a universalized awareness of the need to enforce criminal provisions that initiated what Richard Falk has described as a “normative architecture.”¹² Rest assured that nothing could be more central to the ongoing struggle against transnational terrorism than these formative principles. The modern framework of international criminal law is built on the core premise that the violation of individual human rights by any perpetrator¹³ requires a criminal process that is a “fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁴ Nations around the world now have a distinctive and detailed set of principles that can be incorporated into domestic systems to maximize the uniformity of the substantive body of atrocity law.¹⁵ The substantive criticisms of the International Military Tribunal at Nuremberg helped to facilitate recognition that the simple phrase “international criminal law” needed to have nearly ubiquitous applicability and content or lose its criminal enforceability by remaining too ill-defined and vague to have any practical meaning. The bare provisions of law would remain disembodied today unless effectuated through the proscription and effective enforcement of the most egregious crimes known to humanity – war crimes, genocide and crimes against humanity – while simultaneously balancing human rights norms, state sovereignty, and the interests of justice. To that end, Article 9 of the Rome Statute of the International Criminal Court requires elements of crimes that are designed to “assist the Court in the interpretation and application” of the modern body of crimes derived from international law.¹⁶ Furthermore, the treaty stipulates that the Court “shall apply” the Elements of Crimes during its decision-making.¹⁷ The United States joined a consensus on these elements along with every other nation that attended the negotiations subsequent to the Rome Conference, and thus it may truly be said that we share in the normative homogeneity of the law because it both reflects our common values and preserves and satisfactorily serves our sovereign prerogatives.

¹² See Raymond M. Brown, *The American Perspective on Nuremberg: A Case of Cascading Ironies in THE NUREMBERG TRIALS—INTERNATIONAL CRIMINAL LAW SINCE 1945* 21 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., 2006).

¹³ After extensive debate over the relative merits of the terms “perpetrator” or “accused,” the delegates to the Preparatory Commission (PrepComm) ultimately agreed to use the former in the finalized draft text of the Elements of Crimes. See U.N. Preparatory Comm’n of the Int’l Criminal Court, 4th and 5th Sess., Mar. 13-31, June 12-30, 2000, U.N. Doc. PCNICC/2001/1/Add.2 (Nov. 2, 2000).

¹⁴ International Covenant on Civil and Political Rights, art. 14, ¶ 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹⁵ For a listing of the domestic legislation of national implementing legislation for the crimes of most serious concern to the international community, see *A Universal Court with Global Support*, COALITION FOR THE INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=romeimplementation> (last visited Oct. 17, 2011).

¹⁶ Rome Statute of the International Criminal Court, art. 9, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

¹⁷ *Id.* art. 21, ¶ 1(a).

Principles of Military Professionalism

Before I highlight three residual areas where I believe that legal professionals can usefully serve to clarify international misinterpretation, miscommunication, and mischaracterization, let me pause as requested to familiarize you with the non-derogable principles that form the bedrock of military professionalism the world over. The law of armed conflict developed as a restraining and humanizing necessity to facilitate commanders' ability to accomplish the military mission even in the midst of fear, moral ambiguity, and horrific scenes of violence. Military commanders and their lawyers do not approach the law of armed conflict as an esoteric intellectual exercise, and must always align operational imperatives with the normative bounds of the law. The need for military lawyers grew from the requirements of commanders across the world for legal guidance. The foundational principle of military necessity is, therefore, one of the cornerstones of legality in the proper application of force, but it cannot concurrently serve as a convenient rationale for any level of unrestrained violence in the midst of an operation. To be clear, commanders and their lawyers cannot artificially inject an element of military necessity into the law to support any operational whim. The legal regime itself already incorporates a wide range of legal and operational discretion that is intended to accommodate the good faith accomplishment of the military mission even as it constrains the lawful scope of those operations. In the modern era, for example, the White House press spokesman took pains to explain that the United States is treating all unlawful combatants in its custody "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949."¹⁸ Military lawyers and good commanders develop a very special relationship of trust precisely because the lawyer provides necessary technical advice that the commanders rely upon in solving some of the most complex problems posed by the military mission itself.

I would argue that this modern linkage between operational necessity and legality cannot be underemphasized. One of the enduring truths of any military operation is that any good commander must direct every operation towards a defined, decisive, and attainable objective. The principle of "Objective" derives from the basic principles of war recognized across the globe, and this principle is refined for the purposes of military operations into the "mission statement."¹⁹

¹⁸ *Status of Detainees at Guantanamo*, OFFICE OF THE PRESS SEC'Y (Feb. 7, 2002), <http://dspace.wrlc.org/doc/bitstream/2041/63447/00208display.pdf>.

¹⁹ The Principles of War crystallized as military doctrine around the world around 1800. The accepted principles are: Objective, Offensive, Mass, Economy of Forces, Maneuver, Unity of Command, Security, Surprise, and Simplicity. *THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY* 557 (John Whiteclay Chambers II ed., Oxford Univ. Press 1999). In unilateral operations, the mission statement reflects a relatively linear process of decision-making from the civilian command authorities through military command channels to the tactical force in the field. In multilateral operations, however, achieving consensus on an agreed and refined mission statement is much more difficult and complex. Reflecting this reality, U.S. Army doctrine warns that:

[c]ommanders must focus significant energy on ensuring that all multinational operations are directed toward clearly defined and commonly understood objectives that contribute to the attainment of the desired end state. No two nations share exactly the same reasons for entering into a coalition or alliance. Furthermore, each nation's motivation tends to change during the situa-

The Law of War in the War Against Terror

Even today, there is an undercurrent of opinion amongst the rank and file that immediate operational or situational-dependent convenience can and should serve as a valid excuse for deviating from established legal standards and innate training. This translates into a sense that anything goes so long as it is intended to facilitate accomplishing the mission. Despite this superficial sense, the success or failure of the mission provides the yardstick for measuring the commander's success, and the legal dimension is intertwined as an indispensable strand of overall success or failure. Combat-readiness can be achieved only by melding individuals from disparate backgrounds into a disciplined unit with a fine-edged warrior ethos focused on overcoming any obstacle in order to accomplish the mission. Even in light of the nonnegotiable necessity for accomplishing the mission and the professional military culture that prizes selfless pursuit of shared duty, legal norms provide the glue that bonds individuals into effective operational entities. In the laws and customs of war, to say it plainly, there is simply no room whatsoever for an attitude that proclaims, "the ends justify the means."

You, the young lawyers of tomorrow, are an indispensable dimension of this effort. The detailed prescriptions of the law of armed conflict evolved in response to the demands of tactical and operational pragmatism and the impetus of changing technology, but your legal predecessors provided the necessary expertise in developing the norms that have come to define the very essence of military professionalism. Commanders must balance the need to accomplish the mission against an internalized awareness of the larger legal and ethical context for their actions. This is an important dimension of the discussion related to ongoing operations against transnational terrorism because international discourse tends to be dominated by debates over our differences. In this way, there is a common and altogether false assumption that any reported violation of the *jus in bello* provides disconfirming evidence that the entire legal field is defective and dysfunctional. It goes without saying that you cannot rely on media reports or the impressions of laypersons as the appropriate template for your legal advice. In the legal profession we must be focused on communicating very clearly what the law is, how it's been shifted, and how it's been shaped. As I said before, you cannot forget that there is so much more common ground with our friends and allies than there is conflict. Terrorists, on the other hand, define themselves and their operations in contradistinction to the established norms of international law and the expectations of civilized society.

By extension, international media outlets and laypersons tend to focus on the outliers and areas of disagreement. Indeed the occasional evidences of legal uncertainty and ambiguity are trumpeted as evidence of a disconfirming norm that there is no law at all. You've heard this in shorthand, for example, in reference to descriptions of the detention facility at Guantanamo Bay, Cuba as a "black

tion. National goals can be harmonized with an agreed-upon strategy, but often the words used in expressing goals and objectives intentionally gloss over differences. Even in the best of circumstances, nations act according to their own national interests. Differing goals, often unspoken, cause each nation to measure progress differently. Thus, participating nations must agree to clearly defined and mutually attainable objectives.

DEP'T OF ARMY, F.M. 100-8, THE ARMY IN MULTINATIONAL OPERATIONS, p. 1-2 (1997).

hole” where no law exists. This is simply an inaccurate caricature of the operations at Guantanamo Bay and the legal framework that governs the operations of United States armed forces. Because we share the normative structure of the law and customs of war with professionalized military forces all over the world, you will find rules of engagement written in a variety of languages that describe virtually identical operational guidance. Bangladeshi forces going into operations in Haiti had common rules of engagement written by American lawyers, yet they understood them and applied them correctly because they operated under the umbrella of military professionalism grounded in respect for the underlying laws and customs of war. ISAF forces in Afghanistan have often confronted radically differing interpretations and guidance regarding the application of *jus in bello* and occasionally conflicting treaty derived human rights obligations, but make no mistake about the fact that the vocabulary and training spring from a common corpus and share a common fidelity to the lawful accomplishment of the mission.

The challenge we confront as we conduct kinetic operations against terrorist cells or an individual terrorist is to use the existing framework of law to its fullest extent to accomplish the operational mission and to bring victory. These precepts date from the very beginning of military history in one way or another. Their roots run to the practices of the Greeks and Romans. In fact, the laws and customs of war originated from the unyielding demands of military discipline under the authority of the commander or king whose orders must be obeyed. Writing in 1625, Hugo Grotius documented the Roman practice that “it is not right for one who is not a soldier to fight with an enemy” because “one who had fought an enemy outside the ranks: and without the command of the general was understood to have disobeyed orders,” an offense that “should be punished with death.”²⁰ The modern law of armed conflict is nothing more than a web of interlocking protections and legal obligations held together by the thread of respect for humankind and a reciprocal expectation that other participants in armed conflict are bound by the same normative constraints. This explains its historical roots in conflicts between states and those acting under the authority of states. In practice, you must understand that the historical development of the laws and customs of war has been so infused in military practices that they are inherently designed to function appropriately in the field where people are under enormous personal and professional pressures, and in the midst of mind-numbing violence and operational uncertainty.

Remember that our goal is to win, but to do so in a manner that actually preserves long-term victory. The ancient prohibition against poisoning enemy water sources or mistreating enemies who have fallen into your custody are examples of these principles in that they are designed to facilitate a lasting period of peace upon the termination of hostilities. The modern extrapolation of human rights principles into the field of military operations provides a more current and

²⁰ HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* 788 (Francis W. Kelsey trans., Oxford Univ. Press 1925). Grotius explained the necessity for such rigid discipline as follows: “The reason is that, if such disobedience were rashly permitted, either the outposts might be abandoned or, with increase of lawlessness, the army or a part of it might even become involved in ill-considered battles, a condition which ought absolutely to be avoided.” *Id.* at 788-89.

topical, if somewhat controversial, example. In this context, the core premises of the laws and customs of war originate in the Roman legions, and to be clear, predate any of the web of interlocking treaties that developed in modern times.

We have also seen these principles clouded somewhat in recent years by their migration down the spectrum of conflict to non-international armed conflicts. You would properly infer from the comments I just made that the laws and custom of war became solidified as comprehensive legal norms in the context of conflicts between states that began to be governed by positive bodies of treaty law. In that era, the law was rather simple as a positivist premise. One needed only to look at the applicable array of treaties for a specifically applicable prohibition or policy pronouncement. The past decade has witnessed an uneasy erosion of this certainty as we have seen the predominance of armed conflicts conducted by or between non-state actors. The migration of norms down the spectrum of conflict is exemplified by the inclusion of the criminal prohibitions in Article 8(2)(e) of the Rome Statute, but you should not be lulled into a sense of complacent confidence that the Rome Statute provides the all-inclusive guidance for modern conflict with transnational terrorist actors. In other words, any armed conflict that is not an international armed conflict between states will be governed by a definitive application of the laws and customs of war, yet the precise contours of that application are indistinct and evolutionary. As one of the Nuremberg prosecutors mused, “the law of war owes more to Darwin than to Newton.”²¹ Because the migration of those norms is ongoing, their specific application remains uncertain at times. In other words, there may be treaty principles, operational ambiguity, and comprehensive customary international law operating in the same battle space at the same time. The phraseology of the rules may be identical, but their application is inherently complex. I would be less than candid with you, however, if I tried to convince you the world needs more law regulating the conduct of hostilities—what we need is more intellectual honesty in articulating and applying the parameters of the existing norms, and more good faith discussions on these issues with our friends and allies.

You should also remember that in international law today there is no legal state known as a “transnational armed conflict” which might be defined to incorporate operations against non-state actors whether they be terrorists, transnational drug dealers, international criminal enterprises, or otherwise. This necessarily raises the question of how our current legal framework for regulating conflict interfaces with existing human rights regime. In other contexts, states confront the legal imprecision between the law of occupation derived from the Geneva Convention for the Protection of Civilians and the larger but distinct field of human rights. How do the established principles for targeting overlay in all operational contexts? I believe that we need to have these debates with friends and allies, but we cannot be dissuaded from the overall imperatives of lawful mission accomplishment or the quintessential role for governments to defend the lives and property of their citizens.

²¹ Thomas F. Lambert Jr., *Recalling the War Crimes Trials of World War II*, 149 *MIL. L. REV.* 15, 23 (1995).

The Law of War in the War Against Terror

We do indeed face a continuing tension between the law that we apply and the overall legitimacy of coalition operations. Nevertheless, the goal is ultimate and sustainable victory. The more festering legal imprecision that we permit the more uncertainty we create, which in turn endangers our long-term strategic objectives. Remember that the entire body and customs of war came from the desire to solidify long-term victory. It is no different in this modern struggle against transnational terrorists. In this context, I was struck recently by the characterization of U.S. armed forces as “modern day Mongols” who wreak destruction indiscriminately and without remorse. This is simply absurd in fact. On the other hand, the perceptions may be the most certain predictor of long-term victory in our current struggles. The professional soldier and the seasoned and informed international lawyer rebel against the mischaracterization of modern military professionals as modern day Mongols. In fact, if that perception becomes entrenched in many parts of the world it does not matter how lawful we are, nor how much we pride ourselves in our insular bubble on our respect for and enforcement of the laws of war. We must confront this lingering taint of delegitimization. This persistent subtext of illegitimate military conduct actually plants the seeds for sustained conflict. I simply do not want to see my grandchildren involved in an intractable struggle against transnational terrorist actors. To be plain about it, this linkage between law and legitimacy is absolutely vital for us to master if we are to achieve a sustainable peace.

Let me give you a concrete example of what I regard as normative imprecision and your correlative duty to confront those who would unduly inhibit lawful conduct of hostilities using ill-conceived artificialities and overly fine legal distinctions. As you know, the basic tenet of military necessity provides a touchstone for every act of military forces in every operational context. For every single tactical, operational, or strategic objective there is an accompanying and underlying articulation of core military necessity. This, incidentally, is infused into the classic writings on the conduct of Just War Theory from which we derive our modern *jus ad bellum* concepts. In this light, it is not surprising at all that Article 23 of the 1899 Hague II Convention expressly stated that it was forbidden “[t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.” This same language showed up in Article 8(2)(b)(xiii) and 8(2)(e)(xii) of the Rome Statute of the International Criminal Court. Based on their belief that the concept of military necessity ought to be an unacceptable component of military decision-making, some civilian delegates sought to introduce a totally subjective threshold by which to second-guess military operations. They proposed a verbal formula for the Elements of Crimes that any seizure of civilian property would be valid only if based on imperative military necessity.²² The Elements of Crimes are designed to document the overarching consensus on the precise details needed to substantiate war crimes allegations in modern practice.

²² KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 249 (Cambridge Univ. Press 2002).

Requiring the on-scene commander to demonstrate a wholly inarguable “necessary military necessity” would have been contrary to the entire history of the law of armed conflict. The concept of military necessity is ingrained into the law of armed conflict already at every instance and in every article where it is warranted by practice; introducing such a gradation would have built a doubly high wall that would have had a paralyzing effect on military action that would have been perfectly permissible under existing law prior to the 1998 Rome Statute. This was in no way the intent of the drafters of the Rome Statute. Moreover, a double threshold for the established concept of military necessity would have clouded the decision-making of commanders and soldiers who must balance the legitimate need to accomplish the mission against the mandates of the law. Of course, any responsible commander and lawyer recognizes that because the corpus of humanitarian law enshrines the principle of military necessity in appropriate areas, the rules governing the conduct of hostilities cannot be violated based on an *ad hoc* rationalization of a perpetrator who argues military necessity where the law does not permit it. Such a subjective and unworkable formulation would have exposed military commanders to after-the-fact personal criminal liability for their good faith judgments based only on after-the-fact subjective assessments. The ultimate formulation translated the 1899 phrase into the simple modern formulation “military necessity” that every commander and military attorney understands. The military lawyers among the delegates were among the most vocal in defeating the suggestion to change the law precisely because the elements for such a crime would have been unworkable in practice. The military officers participating in the Elements of Crimes discussions were focused on maintaining the law of armed conflict as a functional body of law practicable in the field by well-intentioned and well-trained forces.

The importance of this role will not diminish in the foreseeable future. Indeed, I would argue that continued ownership of the legal regime by military professionals is essential if we are to sustain the core professional identity system of military forces. Failure to keep the legal norms anchored in the real world of practice would create a great risk of superimposing the humanitarian goals of the law as the dominant and perhaps only legitimate objective in times of conflict. This trend could result in principles and documents that would become increasingly divorced from military practice and therefore increasingly irrelevant to the actual conduct of operations. The real challenge for us in modern practice is to translate many other norms from their 19th century context into the reality of 21st century conflicts. We must continue to develop and clarify legal principles that are applicable and which forestall the inevitable seeds of second-guessing. In passing, I should pause to note that if the proposed formulation had indeed become embedded as a modern legal principle, the effect would have produced an almost unattainable standard of military necessity and given terrorists and other non-state criminal actors a huge propaganda victory. Such a rule would have artificially generated the seeds of their own legitimacy. At the same time, let me reiterate that no responsible commander ever authorizes or intentionally targets civilians or civilian commanders. Ever. That’s a binding core professional norm to which I will return in a matter of minutes. How many times can

you pick up the paper and the headline will be, "Allied forces killed X number of civilians"? The implication of that headline being of course it was an intentional target. The laws and customs of war never permit the intentional targeting of civilians or their property. This is the correct understanding of the enduring principle of distinction in armed conflicts, and you must be both the arbiters of that principle and its enforcers when it is contravened during conflicts.

Lastly, the principle of distinction does indeed raise another modern day wrinkle that we must understand and apply correctly in the context of modern operations against terrorists. The text of Protocol I employed a subtle means of appearing to define away the principle of unlawful combatancy. In attempting to gain the broadest possible protections for civilians, the text implicitly eroded the 1949 notions of combatancy by virtue of an exclusive dualist definition. For the first time in international law, Protocol I attempted to define the term "civilian" purely in contradistinction to the opposing status of combatant. Article 50 embodied this dualist view by defining a civilian as "any person who does not belong" to one of the specified categories of combatant.²³ This provision was intentionally inclusive in contrast to the categories of protected persons defined in the Fourth Geneva Convention of 1949. Thus, a literal reading of the plain text means that a civilian is anyone who is not a combatant. An unlawful combatant would therefore be legally equated to a civilian, and hence entitled to the panoply of protections accorded to that class of persons. This in particular explains the perspective from which many international pundits portray any use of force against terrorists as an unlawful application of military force, or any international killing of any terrorist as an unlawful premeditated murder.

In theory, the dualist view enshrined by the plainest reading of Protocol I would protect any non-state actor who elected to participate in hostilities from the effects of their misconduct. By definition, an unlawful combatant falls outside the traditional characterizations that would otherwise entitle him or her to prisoner of war status. Article 50 seems to embody a system in which there is no theoretical gap; a person is either a combatant or a civilian. This leads to the ineluctable presumption that an unlawful combatant who fails to qualify as a prisoner of war must be a civilian entitled to protection. Being legally classified as a civilian puts the military forces opposing terrorist activities into the quandary of either supinely permitting the planning and conduct of terrorist activities or violating the clear legal norm that the "civilian population as such, as well as individual civilians, shall not be the object of attack."²⁴ There is no middle ground if you look at the text of the protocol, and those of you who have even a passing familiarity in this field will recall that Protocol I applies, by its express terms, only to conflicts of an international character. This attempt to superimpose the principles derived from positivist treaty law applicable to conflicts between state actors in a rigid technocratic manner into the context of struggles against non-state entities is problematic to put it mildly. The modern challenge is to properly apply the principle of distinction in a non-international armed conflict

²³ Protocol I, *supra* note 8, art. 50, ¶ 1.

²⁴ Protocol I, *supra* note 8, art. 51, ¶ 2.

(or, what may be more properly thought of as armed conflict against transnational terrorist organizations). The attempt to create clean and mutually exclusive categories of civilians or combatants cannot be superficially imposed on this new kind of conflict, and in legal terms, such an attempt fails of its own logic because Article 75 of Protocol I implicitly recognizes the third category of unlawful participants in conflict, or in the modern but terminologically troublesome nomenclature, unlawful combatants. Thus, while the law is clear that civilians may never be intentionally attacked, the debates rage in international circles over the circumstances under which the protection may be forfeited and which the attacker may lawfully apply the other precepts of *jus in bello*.

The logical implication of this principle only becomes apparent when we comprehend the proper scope and articulation of the proportionality principle. The Rome Statute of the International Criminal Court embeds its modern incarnation in Article 8(2)(b)(iv). This is a perfect example of the modern practice of migrating the core normative formulations into the context of non-international armed conflicts as Article 8(2)(e)(iv) extrapolates precisely the same text into all conflicts. This articulation of the proportionality principle is commonly implicated in the context of drone strikes. Article 8(2)(b)(4) of the Rome Statute sets out the modern scope of the proportionality principle that evolved both from the reservations taken by NATO states as they ratified Protocol I and its consistent application by states in the context of actual armed conflicts.²⁵ Proportionality is a term of art grounded in the *jus in bello*, but derived from moral and philosophical roots.²⁶ You may not cause suffering or injury to non-combatants or civilian objects that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. In practice, operational mistakes are indeed an unfortunate reality that nonetheless cannot carry an automatic form of strict criminal culpability. Seldom, if ever, will the media describe the painstaking process employed by professionalized military practitioners to comply with *jus in bello*. At the same time, there is an inevitable tendency for practitioners to discount operational errors through the expedient of simply asserting that mistakes are made but that such errors are the regrettable exception given the high degree of legal technicalities. The public has a justifiable expectation of perfection when the ultimate assertion of governmental authority, *i.e.* military force, is applied in the name of any modern sovereign state to achieve its purposes. The tendency to discount our inevitable errors and occasional oversights is overwhelming and unhealthy because it leads to an insulated military mindset. Blanket defensive assertions by military practitioners do little to convey a sense of confidence in the moral purpose of the attacker, and may actually strengthen the long-term sustainability of the terrorist/insurgent enemy.

In the criminal formulation of the Rome Statute, a violation of *jus in bello* is committed only through the *intentional* launching of an attack predictably anticipated to result in disproportionate and hence unlawful damage. For example, as

²⁵ Rome Statute of the International Criminal Court, *supra* note 16, art. 8, ¶ 2(b)(iv).

²⁶ Robert D. Sloan, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 75-76 (2009).

I've already noted this morning, no responsible commander intentionally targets civilian populations, and the law on this matter is clear and fundamental.²⁷ Nor would a responsible military commander ever launch an attack intentionally against civilians or civilian objects or against a target with reasonably anticipated disproportionate results. In the age of 24-hour news cycles, such a commander would foolishly imperil the overarching operational objectives but would also betray the core obligations of the military profession. So, let me pause while we reflect on these truths. If a media outlet or antagonist throws out numbers and press releases to report that a drone strike killed "X" number of people or damaged particular civilian property, the presumption cannot be automatically that those were disproportionate drone strikes. The war crime, the crime that defines the boundaries of professional practice, begins with the word intentionally. The key focus is not on the damage inflicted but on the information available at the time of the attack and the precautions taken by the commander. As an aside, I am proud that the Rome Statute language includes damage to the environment within the purview of the crime of intentionally launching an attack that can be anticipated to result in disproportionate damage. This extension of the law is entirely warranted and to me represents a concrete advancement in our legal understanding of the protections afforded by the applicable *jus in bello*.

From my perspective, States can make dramatic improvements to the overall credibility and operational effectiveness of operations if they are able to be forthright in articulating the positive legal rationales for their choice of targets as well as the means employed in striking a particular target. This is far more than a mechanistic defense of the military mindset; rather it recognizes the overarching operational imperative to show the world that the laws and customs of war are scrupulously recognized and followed. There is an unfortunate and unseemly assumption in many parts of the civilian culture that a professionalized military becomes lackadaisical in the use of deadly military force. This is a corrosive and absolutely unfounded slander in my view. I would argue that we need to be much more aggressive as a matter of national policy in conjunction with our allies and advocate affirmatively why we have complied with the law in every disputed circumstance. Compliance is inextricably linked to our legitimacy as an indispensable aspect of preserving the political and economic strategic support for the conduct of hostilities against terrorist actors.

Before we close by discussing the three modern trends that you should monitor, let's also focus on the phraseology "clearly excessive in relation to the overall concrete and direct overall military advantage." The words "clearly" and "overall" appear for the very first time in international law in the Rome Statute, though they are reflective of the reservations of NATO states in their instruments of ratification to Protocol I. That is the correct definitive statement of the law. In particular, I would point out that these concepts are not artificially constrained by geographic or temporal limitations, and the footnote to the Elements of Crimes for Article 8(2)(b)(iv), which as you will recall was adopted by international consensus of all states, expressly embeds that understanding. To put this in per-

²⁷ Protocol I, *supra* note 8, art. 52.

spective, we will engage in debate and searing analysis over the proper scope for the use of military forces under the *jus ad bellum* framework. However, within the context of *jus in bello*, once we are lawfully engaged in hostilities, the modern definition of proportionality very clearly says there are no automatic *a priori* temporal or geographic limits.

Of course, this principle cannot be understood or applied in isolation. The *jus in bello* factors we have discussed this morning operate as an integrated and completely inseparable legal template. In other words, *jus in bello* is best thought of as a complex pallet of legal obligations that are independent of context, convenience, or operational imperatives. They mark the dividing line between legitimacy and wholly inappropriate applications of force. For the military, they define the professional norm and suffuse compliant units with an indispensable unity of purpose and cohesion. Framed another way, ignorance or willful violation of these norms can bring nothing but shame, disregard in the eyes of our allies and friends, and ultimate ineffectiveness in the struggle against transnational terrorists.

Three Modern Trends

Let me close by briefly remarking upon the three key areas that I should think are vital for your further involvement in this field.

Firstly, there is a growing line of argument that human rights principles mandate an independent and impartial investigation of any alleged violation of the laws and customs of war. On its face, this principle is completely uncontroversial. As a legal practitioner conducting operations, you must be vigilant in identifying and investigating any shade of illegality in the conduct of operations. That is your legal duty, and is in fact one of the most important services that your expertise and insight can provide to commanders and to those warriors who are the essential components of victory over our enemies. Indeed, in the words of the Goldstone Report convened to examine Israeli operations in Gaza in 2009, “both international humanitarian law and international human rights law establish an obligation to investigate and, if appropriate, prosecute allegations of serious violations by military personnel whether during military operations or not.”²⁸ The Report states the uncontroversial conclusion that Israel had the obligation to investigate allegations of grave breaches of the Geneva Conventions,²⁹ but goes on to postulate a parallel obligation to investigate actions in the midst of hostilities under international human rights law.³⁰

Asserting an unspecified source of international common law, the Report refers to human rights jurisprudence drawn from regional tribunals (which of course is not binding on Israel as a matter of hard law) to assert that the responsibility to investigate “extends equally to allegations about acts committed in the

²⁸ Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, 12th Sess., ¶ 1804, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

²⁹ *Id.* ¶ 1851.

³⁰ *Id.* ¶ 1806.

context of armed conflict.”³¹ The Report then concluded that the use of operational debriefings does not satisfy the requirement for an independent and impartial tribunal.³² Quite the contrary, in the view of the Commission, operational debriefings actually frustrate a genuine criminal investigation because they often occur only after the passage of some time, often result in destruction of the crime scene,³³ and delay the prompt commencement of an independent and impartial investigation.³⁴ The Report drew an artificial and wholly unsubstantiated conclusion that a delay of some six months from the operational debriefing to a full criminal investigation by the Military Police Criminal Investigation Division is excessive and, therefore, *per se* impermissible as a failure of the obligation “to genuinely investigate allegations of war crimes and other crimes, and other serious violations of international law.”³⁵

Thus,

[t]he Mission holds the view that a tool designed for the review of performance and to learn lessons can hardly be an effective and impartial investigation mechanism that should be instituted after every military operation where allegations of serious violations have been made. It does not comply with internationally recognized principles of independence, impartiality, effectiveness and promptness in investigations. The fact that proper criminal investigations can start only after the “operational debriefing” is over is a major flaw in the Israeli system of investigation”³⁶

The Israeli response announced on July 6, 2010, revealed that after investigating more than 150 incidents, of which nearly 50 resulted in formal criminal investigations, military officials decided to take disciplinary and legal action in 4 cases, including some that were highlighted by the Goldstone Report.³⁷ The subtlety that was lost on the Goldstone commissioners is that operational debriefings are an essential aspect of the ebb and flow of tactical operations and an entirely appropriate extension of the commander’s obligation to ensure that operations are conducted in accordance with the intent of the orders given and within the boundaries of the law. In fact, the failure to inquire into relevant circumstances or allegations of unlawful uses of force might well be taken as an abdication of the inherent obligation of a commander to ensure the compliance and respect for *jus in bello* at all times in all operational contexts. The official Israeli response explains that the purpose of a preliminary command investigation, just like those employed by every professionalized modern military is to collect available infor-

³¹ *Id.* ¶ 1811.

³² *Id.* ¶ 1959.

³³ *Id.* ¶ 1817. For example, ballistic evidence is not preserved as weapons used in the incident are not confiscated.

³⁴ *Id.* ¶ 1820.

³⁵ *Id.* ¶ 1823.

³⁶ *Id.* ¶ 121.

³⁷ Press Release, Israeli Defense Fund, IDF Military Advocate General Takes Disciplinary Action, Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead (July 6, 2010), available at <http://dover.idf.il/IDF/English/Press+Releases/10/07/0601.htm>.

mation related to potential wrongdoing. It emphasizes that the operational debriefings do not replace a criminal investigation, but “serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation.”³⁸ The advice of a military judge advocate is determinative of the ultimate disposition of a particular case rather than the preliminary commander’s investigation.

This dimension of the Goldstone Report - despite my deep personal respect for Justice Goldstone - represents a pernicious expansion of international common law in a manner that would dramatically undermine military operations. You, the lawyers must conduct appropriate investigations, but do so within a tactically relevant framework. The Israeli Supreme Court, sitting in its capacity as the High Court of Justice, charged with protecting and vindicating human rights standards, concluded that command investigations are “usually the most appropriate way to investigate an event that occurred during the course of an operational activity.”³⁹ Indeed, the essence of command authority is to understand the flow of battle and to take ameliorative actions swiftly when needed. Taken to its logical end, this human rights grounded perspective on investigation of alleged wrongdoing during hostilities would paralyze operations and erode the commander’s ability to direct hostilities.

It is simply ludicrous to suggest that ongoing operations be halted at the slightest suggestion of impropriety to permit ballistics analysis of any weapons that might have been involved in the firefight and to subject all potentially involved personnel to full-blown criminal investigations as precondition for compliance with the laws and customs of war. Rather than striving to defeat a superior adversary on the field of battle, the enemy could literally disarm entire units merely by alleging violations on the part of an attacking force. The surge in spurious allegations surely would undermine the credibility of the legal norms in the minds and methodology of attacking forces. In fact, if every report of possible wrongdoing required operational commanders to freeze the fight, during which an enemy could resupply, refit, and retrench either figuratively or literally, a newly-imposed Goldstone-inspired investigative standard would actually create an almost overwhelming disincentive to report and document war crimes.

The laws and customs of war are designed to maximize respect for human dignity and humanitarian norms, even as they facilitate the lawful accomplishment of military objectives. The textual requirements of Protocol I already balance the need of the commander to effectively conduct military operations with the overriding duty to ensure compliance with the laws of war or to take appropriate remedial or investigative action.⁴⁰ Article 86, for example, represented a major development in the field as it gave textual formulation to the historically

³⁸ *Id.*

³⁹ See *Mor Haim v. Israeli Defence Forces*, HCJ 6208/96 [1996] (Isr.) (addressing appropriate standards for investigating the circumstances of the death of a soldier during an IDF operation).

⁴⁰ See generally Protocol I, *supra* note 8.

developed doctrine of superior responsibility.⁴¹ Paragraph 2 of Article 86 places investigative responsibility on the shoulders of responsible commanders by stipulating that a superior may be criminally liable for the crimes of a subordinate if three criteria are proven: (1) senior-subordinate relationship; (2) actual or constructive notice on the part of the commander of wrongdoing; and (3) failure to take measures to prevent the crimes.⁴² It is the commander's obligation to take all "feasible measures" to prevent or to repress breaches of the laws of war.⁴³ Furthermore, the laws and customs of war expressly obligate the commander to prevent and "where necessary, to suppress and to report" violations to competent authorities.⁴⁴ Thus, the *per se* assertion that commanders do not have authority to investigate wrongdoing in their own units and that only full-blown criminal investigations conducted by external authorities are compliant with the international standards would erode the preexisting obligation and authority of the commander and undercut the obligations of humanitarian law. Such an untenable and unworkable extension of investigative principles into the context of conflict is both unwarranted and illegitimate.

Secondly, we need to reconceive the way that we apply the law of command responsibility. Although Nuremberg effectuated the 1907 Hague Regulations in a manner and spirit that created enduring truths and literally changed the world, some of its most signal achievements also represent its most threatened legacy. The principle of personal accountability is the very heart of the Nuremberg achievement, yet paradoxically it's most potent and politically controversial dimension. Herman Göring complained about the "damned court – the stupidity," and asked his American psychiatrist, "why don't they let me take the blame and dismiss these little fellows – Funk, Fritzsche, Kaltenbrunner? [I never heard of most of them until I came to this prison!]"⁴⁵ Justice Jackson recognized that a modern era of accountability would necessarily confront the dual realities of sovereign immunity and superior orders. He had enough insight to recognize that with the doctrine of official immunity or head of state immunity "usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility."⁴⁶

⁴¹ Protocol I, *supra* note 8, art. 86.

⁴² Protocol I, *supra* note 8, art. 86(2); *see also* Commentary on Additional Protocols I and II, part V, art. 86, ¶ 3543 (June 8, 1977).

⁴³ Protocol I, *supra* note 8, art. 86(2).

⁴⁴ Protocol I, *supra* note 8, art. 87(1).

⁴⁵ ROBERT GELLATELY & LEON GOLDENSOHN, THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST'S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES 101 (2005).

⁴⁶ *International Conference on Military Trials: London 1945, Report to the President by Mr. Justice Jackson, June 6, 1945*, THE AVALON PROJECT: YALE LAW SCHOOL, <http://avalon.law.yale.edu/imt/jack08.asp> (last visited Oct. 17, 2011) (going on to opine that "superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or the S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all.").

Paraphrasing Justice Jackson's assessment of the International Military Tribunal at Nuremberg, "no history" of a modern conflict that includes mass atrocities will be "entitled to authority" if it ignores the factual and legal conclusions engendered by the work of a court that investigates and prosecutes the officials who orchestrate the power of the state into a concerted criminal enterprise.⁴⁷ The revocation of immunity stands for the principle that personal immunity flowing from the official position of an accused is property of the state and cannot be perverted into an irrevocable license to commit the most serious crimes known to mankind. Not only does a sovereign state have the right to revoke immunity flowing from constitution or statute, the Iraqi Cassation⁴⁸ decision upholding Saddam Hussein's death sentence even concluded:

it is the duty of the state to exercise its criminal jurisdiction against those responsible for committing international crimes since the crimes of which the defendants are accused of in the Dujail case form both international and domestic crimes and committing them constitutes a violation of the International Penal Code and the Law of Human Rights while at the same time violating Iraqi laws.⁴⁹

The same sentiment flows from the authority of the commander charged with supervising operations in accordance with the laws and customs of war. In perhaps the clearest jurisprudential statement regarding the specific liability attaching to authority figures during operations, the Cassation [or Appeals] Panel wrote that crimes committed while subject to a grant of immunity should be subject to more severe punishment. This principle is worthy of emulation in other tribunals as other nations strive to apply the substantive content of international law, and may over time represent the single most important legal concept to come out of the Al-Dujail verdicts. The cloak of official immunity is a factor for aggravating the sentence because in the words of the Iraqi jurists:

a person who enjoys it usually exercises power which enables him to affect a large number of people, which intensifies the damages and losses resulting from commitment of crimes. The president of the state has international responsibility for the crimes he commits against the international community, since it is not logical and just to punish subordinates who execute illegal orders issued by the president and his aides, and to excuse the president who ordered and schemed for commitment of those crimes.

⁴⁷ *Id.* (stating, "We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people.").

⁴⁸ Iraq's court of appeals.

⁴⁹ Iraqi High Criminal Court, Cassation Panel, decision No. 29/c/2006 of December 26, 2006, Al-Dujail Final Opinion (Iraq) *unofficial English translation available at* http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf [hereinafter Al-Dujail Final Opinion]; see also THE POISONED CHALICE: A HUMAN RIGHTS WATCH BRIEFING PAPER ON THE DECISION OF THE IRAQI HIGH TRIBUNAL IN THE DUJAIL CASE, HUMAN RIGHTS WATCH 32 (June 2007) *available at* <http://hrw.org/backgrounder/ij/iraq0607web.pdf> (noting that the brevity and timing of the appeals decision has been the subject of heavy criticism).

The Law of War in the War Against Terror

Therefore, he is considered the leader of a gang and not the president of a state which respects the law, and therefore, the head chief is responsible for crimes committed by his subordinates, not only because he is aware of those crimes, but also for his failure to gain that awareness.⁵⁰

Because non-state actors, who by definition have these loose command structures, confront the coalition of civilized states, we must reframe our juridical approach to these issues. Terrorists by definition operate with loose operational structures, and in many instances, it will be impossible to trace a definitive linear hierarchal line of authority. That's the first problem. The second problem, of course, is that in many current operations coalition forces may actually be allied with those same kinds of groups—non-state actors and sub-state actors with very shady lines of authority. Lawyers must do all that is feasible to ensure that the commanders of these loose organizational structures use their authority to enforce the legal norms insofar as possible. We cannot permit the operations of professionalized forces or the overall strategic mission to be endangered by the conduct of coalition allies with such unconventional command structures. Conversely, anything less than our best efforts to educate forces and enforce compliance with the laws and customs of war would effectively immunize our enemy from the consequences of intentional disregard for the law.

There simply is no moral or legal equivalence between terrorist organizations and actors and the professionalized armed forces of the world. The skeptics among you might ask, "why would there be such a bright line intellectual and morally defensible distinction?" In my view, the reason derives from the very principle of the law of armed conflict. The underlying principle of law is the law of effective responsibility and effective control. On the one hand, the current formulations of the legal test for assessing effective control are a very westernized hierarchical line and block charts. Effective control is far more than a simple checklist of factors to be considered by a court. The current judicial template is too rigid and formulaic and jurists tend to cram situations into that template that do not fit. The world has changed. The methods for conducting and controlling operations have shifted. The law needs to change accordingly. You will be faced in practice with the challenge of reconceptualizing the scope of effective control by putting responsibility precisely where it lies most authoritatively. To be clear, the commander bears this responsibility. It is the commander in a transnational context that initiates and controls violence. Regardless of the form of the lines of authority, or the precise control over the actions of subordinates who may operate on another continent with little or no communication, the person who initiates violence and yet fails to institute mechanisms for compliance with the laws and customs of war should bear ultimate criminal responsibility for those acts. This is far more important than a simple application of criminal norms. The commander bears a near-sacred obligation to implement and enforce the laws and customs of war and therefore should face accountability for the willful failure to do so. In my view, it should be very close to a strict liability test because only the authoritative commander can constrain the use of force. That is

⁵⁰ Al-Dujail Final Opinion, *supra* note 49.

the very essence of command, and that is why commanders have the affirmative obligation under both human rights law, and the laws of body and customs of war, to sustain the application of that war in a lawful way. Some would say that means that terrorists who have initiated violent activities against civilians are always responsible for those acts, and to that I say, "Amen." That's the way it should be.

Finally, let me close by briefly mentioning the current disconnect between the law regulating the resort to force and the law that we have discussed which applies to the actual conduct of hostilities. We have in practice widely conflated the concepts governing the use of force and the law of *jus ad bellum* with the concepts and constraints embedded in the law regulating the actual conduct of hostilities, the *jus in bello*. I do not have the time to elaborate on all of the implications of this conflation. The panels to come today will describe many of the challenges posed by current operations. As only one example of the thicket of legal issues, a wide range of often-conflicting rationales will justify strikes against terrorists. Even if we can properly categorize a particular terrorist actor as a civilian entitled to protection under the laws and customs of war, it may well be legally possible to internationally target that terrorist. In this vein, I would urge us to revisit the law of reprisals. For those uncomfortable with the word reprisals because it implicitly carries the presumption of illegality in response to a prior wrong, let me characterize the concept as a "responsive use of force." There is no definitive basis in international law today to argue that a terrorist who internationally kills and maims innocents should be protected from the kinetic consequences of those crimes by an antiquated reluctance to engage in a limited form of reprisal. States have the appropriate right to use force to protect the lives and property of their citizens against the depredations caused by transnational terrorists. To be sure, such offensive acts must still conform to the larger legal regime imposed by the *jus in bello*. We must strive for a clear and internationally authorized conceptual basis for striking back against terrorist cells. The objective is to win in the strategic battlefield overseas and in the courts around the world. Conversely, a clear understanding of the consensus views related to the interrelationship between the *jus ad bellum* rights of states to exercise their inherent and sovereign self-defense using the appropriate *jus in bello* will prevent the manipulation of those norms or the inappropriate imposition of criminal liability based on politicized manipulation of the law itself. Until we can achieve international consensus in reframing the law of reprisals so that terrorists have every expectation of a swift and internationally uncontroversial military response, we will have surrendered the initiative forever to the terrorist enemy.

On that note, I thank you for your patience and for your presence. The panelists to come will no doubt amplify on some of these points, and raise other wrinkles. You are on the side of those who care about the law. You share a belief not only in the efficacy of law but in its larger nobility. I am reminded of the possibly apocryphal story recounted by Leslie Weatherhead from the Battle of the Bulge. In the midst of the German offensive, as American forces were pushed back in the bitter cold, a rifleman was mortally wounded some fifty yards in front of the sagging defensive positions. His buddy saw him lying wounded and im-

The Law of War in the War Against Terror

mediately left the safety of his foxhole to be at the side of his dying friend. He succeeded in dragging the body back to the friendly positions, but at the cost of a grievous and obviously fatal wound. The infantry company commander was incensed and berated the dying man. "Why did you do that! That was idiotic! It's not worth it – now I've lost two of my very best!" The dying infantryman looked back at the officer and replied, "Oh yes sir. It was worth it. When Jack looked up at me and said, 'I knew you'd come.' And then he died in my arms."

There is no doubt that you will confront enormous challenges and face sometimes daunting difficulties. At the risk of sounding maudlin, you must never forget that it is the fabric of adherence to the laws of war that provides a commonality of values that bind professional military forces all around the world. The current war against terror really does get back to an elemental struggle between those who believe in the rule of law and those who do not. As lawyers, you should stand in unwavering unity with those who support civilized societies. When the integrity of the law is challenged, and perhaps undermined to the operational advantage of transnational terrorists whose very premise is to ignore the law, you must confront that challenge. To the extent that we allow the framework of the laws and customs of war to be perverted in its core purpose by the enemy, we actually endanger the very vitality of law itself. That is why this Symposium is far more important than a simple ivory tower intellectual debate. This is why this discussion matters. You are collectively embarked on a noble calling that is grounded in the inherent power and legitimacy of strong legal grounding. This is not only admirable in an era of shallowness and flippancy, I would argue that it is not just a good idea, it is an absolute necessity in the 21st century. Thank you for your time and your attention.

